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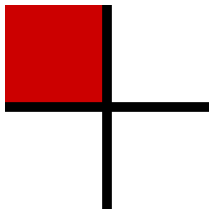


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Primitive accumulation, the social common, and the contractual lockdown of recording artists at the threshold of digitalization

Matt Stahl

abstract

This article examines the apparent paradox of the persistence of long-term employment contracts for cultural industry ‘talent’ in the context of broader trends toward short-term, flexible employment. While aspirants are numberless, bankable talent is in short supply. Long-term talent contracts appear to embody a durable, perhaps inherent, axiom in employment: labour shortage favours employees. The article approaches this axiom through the lens of recent reconsiderations of the concept of ‘primitive accumulation’. In the case of employment, this concept highlights employers’ impetus to transcend legal and customary barriers to and limits on their capacity to capture and compel labour. The article supports this argument through the analysis of contests between Los Angeles-based recording artists and record companies over the California and federal laws that govern their political-economic relationships. These struggles reveal a pattern of attempts by record companies to overcome or change laws that limit their power in the employment relation. The article suggests that as contractual norms change under digitalization, familiar political dynamics continue to characterize the relationships between recording artists and the companies that depend on their labor.

[W]hen a statesman looks coolly on, with his arms across, or takes it into his head, that it is not his business to interpose, the prices of the dexterous workman will rise.’ (James Steuart, 1767, quoted in Perelman, 2000: 155)

Introduction

Binding, long-term employment contracts for creative labour (or ‘talent’, in industry jargon) are important to the recording industry and have featured in legislative and courtroom battles between recording artists and record companies for decades. Today, points of contractual friction are shifting as artists and companies explore new contracting conventions in response to challenges stemming from digitalization and the unauthorized distribution of music via the Internet. Where record companies and recording artists often argued before lawmakers and judges over the allowable duration of their contracts, they are increasingly concerned with negotiating the contract’s coverage of formerly off-limits recording artist activities such as touring and merchandising. Drawing mainly on legislative and judicial documents and trade journal reportage, this article examines ongoing changes in contracting conventions. It traces

late 20th century contests over laws that governed recording contracts, and considers the ‘360 deal’, one of the main contractual innovations emerging in response to the recent destabilisation of the recording industry. The article links the political-economic logics of contracting under the old and emergent regimes through the lens of ‘primitive accumulation’, a Marxian concept that highlights capitalists’ ongoing drive to overcome legal and/or traditional limits to the extension of the capital relation (De Angelis, 2004, 2001; Bonefeld, 2001; Midnight Notes Collective, 1990; Perelman, 2000). It argues that even in the contemporary context of labour’s increasing casualisation, the impetus of cultural capitalists toward contractual capture and control of valuable talent exemplifies the usefulness of the ‘primitive accumulation’ perspective in the analysis of work and employment.

Option contracts, rules, and the ‘360 deal’

Unsure of new artists’ potential value, record companies typically require new artists to sign open-ended ‘option’ contracts. Option contracts give companies the exclusive right periodically to renew or end the employment; if an artist under contract becomes (or shows promise to become) profitable, the company will typically exercise its option(s) to continue the relationship, if not, they can ‘drop’ the artist. Option contracts essentially guarantee employer control of the artist’s creative labour and products on an exclusive and assignable basis for as long as the employer chooses to exercise it; artists under such contracts face severe penalties for breach. The benefit to employers of this kind of control is a substantial legal claim on the forms of income that can be generated from the marketing of the artist’s work and likeness which, conversely, obligates the company to very little. Moreover, most new artists sign their first contracts from positions of bargaining weakness, as relative unknowns. While artists may be able to renegotiate for better terms as they become more successful, these contracts prevent them from offering their talents to other bidders on an open market, thus keeping their costs to their initial employer artificially low.¹

Despite the option contract’s general auspiciousness for employers, companies making use of it sometimes encounter obstacles or limits to the full exploitation of the contract’s advantages. Among the impediments to the maximisation of the option contract are labour and bankruptcy law, which preserve some rights for artists in their status as employees by setting limits on what can be included in the contract. Employers of valuable talent have long chafed against the legal obstacles and limits posed by these forms of law; their legislative activities evince a pattern of attempts to change law in order to reduce or remove these impediments.

As a result largely of digitalization and file-sharing, however, recording artist contracting is taking place in a business environment that is extremely different from the one in which these longstanding conventions developed. In particular, record sales have begun to lose their pride of economic place as the ‘hole in the universe’ rent by

1 The logic of the long-term option contract is so favourable to entertainment-industrial stability, in fact, that some contemporary Hollywood observers are suggesting the film industry ought to revisit some of the legal labour practices of the system that were tossed out along with the system’s many illegal aspects (Moore, 2009).

file-sharing threatens record industry revenues (Pareles, 2010: AR1).² One way around this problem has been the development of the ‘360 (degree) deal’, so named because it enables the company to ‘participate’ in virtually all artist activities and revenue streams, including such formerly off-limits areas as merchandise and touring (Leyshon et al., 2005). With the 360 deal comes a shift of attention and emphasis from the public/legislative to the private/contractual arena. The RIAA’s member companies are developing a new contractual form in which terms that are governed by law (such as duration) concede priority to terms that spell out the number and kinds of activities that the contract covers. However, not all has changed: a ‘primitive accumulation’ analysis highlights crucial continuities between the fading and emerging regimes. Under the 360 deal, this analysis suggests, ‘unconscionable’ conditions of indentured or even involuntary servitude that some analysts find codified in the recording contract (Anorga, 2002; Gardner, 2006; Brereton, 2009), ‘in which the victim is forced to work...by use or threat of coercion through law or legal process’ (United States v. Kozminski, 1988), appear to become more rather than less of an issue in the record industry.

Primitive accumulation

In both the royalty-driven, individual unit sales era and the internet-destabilised, still-working-on-a-stable-business-model era, record companies use recording contracts to secure control over certain of the recording artists’ activities. They do this by requiring that artists (voluntarily) make themselves contractually vulnerable – legally unable to say ‘no’ without penalty – to certain kinds of demands.³ Many of the earlier era’s demands had to do with how long a successful artist could be held to a relatively narrow contract; many such demands were limited by forms of law that endowed employees with some countervailing powers and rights. Today’s demands increasingly concern the breadth of the range of artist activities in which a company may ‘participate’ (by claiming some portion of revenue related to given activities and/or some rights of decision-making power over them); legal limits have become less important in determining which activities can be contracted for.⁴ In both cases the dynamic at issue is the extension of employer power, whether across greater lengths of time or over a wider range of activities. In each case, this analysis argues, extension requires the transcendence of former (legal or customary) limitations or obstacles to increased employer power, of which the obvious corollary is increased employee vulnerability.

Employer efforts to increase employer power and worker vulnerability are not new; the efforts of record companies under both regimes have an illuminating analogue in a phenomenon first called ‘primitive accumulation’ by Marx’ translators, and recently elaborated in Marxist political theory and economic history. For Marx, capital is not a

2 File sharing is far from the only culprit in the music industry’s crisis of profitability (Leyshon et al., 2005; Peitz and Waelbroeck, 2004).

3 The question of substantive vs. formal voluntariness is beyond the scope of this paper. For an illuminating treatment see Macpherson (1973).

4 Of course, recording contracts could not legally require artists to do anything illegal; such a contract would be invalid.

thing (e.g., Adam Smith's 'stock') but a relation: the separation of people from direct access to the means of subsistence and production. This separation renders some people – those who have not already accumulated or inherited wealth – dependent on markets in which they must sell their labour and, with their money wages, purchase what they need to survive. Primitive accumulation has conventionally been understood to describe a historical period when nascent or proto capitalists advanced the preconditions for capitalist development through the enclosure of common lands. Enclosures curtailed people's rights and access, for example, to land on which they could grow food for themselves, increasing the pressure on them to buy rather than grow what they needed, and to undertake paid work to earn the necessary wages.

Recent reinterpretations of Marx' writing, however, suggests the concept plays a much more central and ongoing role in economic life. Massimo De Angelis argues for a broadening of primitive accumulation to include all efforts by capital – personified by its owners and their agents – to transcend various limits and barriers to the extension of capital's relation of separation. As a political-theoretical category, De Angelis writes, primitive accumulation 'define[s] a strategic terrain among social forces' not locked in the past (2001: 68). The logic of primitive accumulation is starkly visible, for example, in present-day efforts to privatise public utilities such as water and water services. Public utilities prioritise people's rights and access to necessary means of life, demarcating areas of life protected from (excessive) commodification; their privatisation represents capital's transcendence of prior limits on the penetration of markets into hitherto protected (non- or less-marketised) areas of life.

A 'social common'

The privatisation of water is an easily legible example because it so clearly rehearses the spectacular enclosures of the early period at the same time as it exemplifies the continuous nature of primitive accumulation in the modern world. Axiomatically speaking, in a fully marketised society (an impossibility in all but the most extreme contractarian fulminations), you have no right to anything you have not purchased. The maximal proliferation of markets in drinking water depends on the elimination of non-market or traditional or human rights to water. Without a right to clean water, thirsty people are at the mercy of those who hold title. Alongside plainly visible enclosable commons like clean water is a less legible but equally important 'social common' which 'sets a limit to the extension, the scale' of the capital relation in everyday life (De Angelis, 2001: 18). According to De Angelis, 'socio-economic rights and entitlements' are bulwarks (often resulting from 'past battles') that protect people's standard of life, as do rights to water their ability to live. 'State institutions', he writes, 'have developed and attempted to accommodate many of these rights and entitlements with the priorities of a capitalist system. The entitlements and rights guaranteed by the post-war welfare state for example, can be understood as the institutionalisation in particular forms of social commons' (De Angelis, 2001: 19).⁵ 'A classic example', De Angelis writes, 'is

5 De Angelis notes that this dynamic is captured in Polanyi's account of the social-protective 'double movement':

[O]n one side, there is the historical movement of the market, a movement that has no inherent limits and that therefore threatens society's very existence. On the other, there is society's

the body of rights, provisions and entitlements universally guaranteed by the welfare state in spheres such as health, unemployment benefits, education, and pensions” (2004: 80). These serve as limits to the extension of the capital relation, or marketisation, because they underwrite people’s capacity to say “no” to degrees of domination and exploitation considered excessive by the social movements and policymakers responsible for them.

The rights and entitlements embedded in the forms of labour- and debtor-protective legislation attacked by the RIAA in the cases I recount below are not identical with those rights to resources and public wealth named by De Angelis above. I nominate them, however, as an intermediary form that ought to be considered as part of the social common because they share with those rights the practical function of limiting the power of employers to compel people in and to work. The barriers to market influence created by the “rights and entitlements” De Angelis names are not impermeable; these rights and entitlements can be more or less influenced by markets and yet still have incrementally egalitarian effects. In the U.S., for example, the quality of ‘public’ primary and secondary education your children can expect is determined to an enormous degree by the property taxes collected in your neighbourhood; market values of homes thus play a role in determining how much public money is directed to schools in different neighbourhoods (Barry, 2005: 67-68). No progressive would deny, however, that full marketisation of education would pose a disastrous advance from this partial market influence. However imperfectly, publicly-funded education mitigates the influence of markets on the distribution and quality of education. Similarly, labour-protective legislation attenuates the power of markets to set the terms of employment, without creating totally non-market social spaces.

The rules of contract duration, minimum compensation, and bankruptcy protection attacked by the RIAA help(ed) protect working people from being held under contract by a single employer, guaranteeing them the limited but real right periodically to take advantage of competition between employers for their services or to leave the employment altogether. These rules put limits on employers’ market power without rendering affected working people invulnerable to market power. In each case, where the record company-recording artist relationship met certain conditions, the rule could intervene and open an exit for the artist, even when the artist had voluntarily agreed to unfavorable terms. In each case, the RIAA sought to place obstacles in front of these exits, in order to make it easier to keep valuable artists under contract for as long as could be desirable. All three of these efforts are better understood in the context of the significant autonomy enjoyed by successful, late 20th century recording artists.

propensity to defend itself, and therefore to create institutions for its own protection. In Polanyi’s terms, the continuous element of Marx’s primitive accumulation could be identified as those social processes or sets of strategies aimed at dismantling those institutions that protect society from the market. (De Angelis, 2004: 69)

Recording artist autonomy

Part of the reason why record companies work so hard to establish control over the labour and output of recording artists is the unusually high degree of autonomy typically enjoyed by many recording artists. The extraordinary position of recording artists relative to other forms of talent in film, television, publishing and other popular media has at least two medium-specific explanations.⁶ First, and most significantly for the present discussion, recording artists' unusual autonomy is rooted in their historically-developed ability to derive significant incomes from activities not covered by their recording contracts. This pattern emerged in an exemplary form among mid-20th century U.S. swing bands. As Jason Toynbee writes, these touring ensembles, like the rock'n'roll and rock groups that followed them, 'were able to sell their services directly to several buyers' – of live as well as recording studio performances – "and so avoid dependence on any single one" (Toynbee, 2003: 44). This self-sufficiency has shaped the terms of record deals for many popular music performers. It has become institutionalised and can limit record companies' capacity to control the labour of their artists. (As I show below, this theme appears in record companies' arguments for laws that would increase their leverage in contractual relationships with performers.) Second, the market value of a popular musician can rest to an unusual degree in the public's perception of the artist as autonomous. This principle has long been understood to operate primarily in jazz, folk, blues, and rock cultures, where evidence of an act's authenticity is important to fans' monetizable investments (Frith, 1981; Keightley, 2001), although recent scholarship has shown that this principle is also important in other genre cultures (Leach, 2001; Stahl, 2002; Tregoning, 2004).

The combination of these factors positions many recording artists at what might be called a frontier of employee control and autonomy in market society. Recording contracts are contracts for employment, but these artist-workers' autonomy seems to call that status into question, making them appear more like independent contractors. Employment presumes dependence, but recording artists are already quite independent. Employment law limits employees' vulnerability to employer fiat; the unusual independence of recording artists is (or rather was – see section 4, below) further consolidated, supported and protected by such law. The recording artist's significant degrees of independence often (but not always) translate into significant degrees of autonomy in their contractual employment,⁷ and are often perceived by their employing record company firms as a threat to the stability and profitability of their business. If the profitability of the recording industry depends in large part on the power of record companies to capture, elicit, and control the 'recording services' (and resulting 'phonorecords') named in recording contracts, then recording artists' capacity to avoid, thwart, or mitigate record companies' power of capture and control constitutes the

6 Recording artists' asserted ownership of copyright in their sound recordings may constitute an additional explanation of their autonomy. See Nimmer and Menell, 2001; Stahl, 2008.

7 The case of George Michael (Panayiotou v. Sony Music Entertainment (UK) Ltd., 1994) illustrates the nonidentity of independence and autonomy. When blockbuster artist Michael began to change musical directions, Sony, he charged, refused to promote a new album reflecting his emerging (autonomous) musical vision, believing that fans would not accept it. Michael lost a subsequent suit to be released from his contract (Soocher, 1999: 43-63).

degree to which (companies fear) artists can hold companies at ransom over various contractual issues’.

In the latter decades of the 20th century, in response to real and perceived threats to their power to capture and control recording artist labour, the major record companies (to whom many of the most successful artists were under contract) sought to set limits on the autonomy of their artists. Through the RIAA, the major record companies pursued, resisted, and sometimes obtained significant changes to law that could or would alter the bargaining ‘playing field’. Artists, with less success, have struggled against and also pursued legislation. The lion’s share of these changes has benefited record companies by expanding their power to command recording artists’ labour.

Legislative contests

1979-87: The ‘Olivia Newton-John problem’ and California’s ‘seven year’ rule

The late 20th century era of record label-recording artist legislative battles was initiated by the RIAA following the resolution of a 1979 court contest between the singer Olivia Newton-John and her record label, MCA Records. The singer had given notice of her intention to stop recording under their 1975 contract, and MCA, who had been reaping significant profits from the deal, sought to induce her to keep recording for them (or at least inhibit her from competing with them) by preventing her from recording for any other record company. Superficially, the decision in the case favoured MCA: the appellate court approved and enforced an injunction to prevent the artist working for any other record label for the two-year remainder of the term of her contract with MCA. However, when the dust settled it was clear that the interests of Olivia Newton-John (and of recording artists as a group) had been better served by the decision than those of MCA (and of the other major record labels). This discovery led to the RIAA’s successful effort to change California labour law to its advantage.

At both the lower and appellate levels, the Olivia Newton-John case involved the interpretation of a century-old California law that limited the duration of employment contracts to seven years: both courts held that no injunction could extend past that law’s seven year limit. This finding alerted artists to an interesting fact: the only penalty to which an artist in breach of contract could be subject was a period of recording studio idleness that would end on the seventh anniversary of the artist’s contract. For artists who could earn income by touring or appearing in films, for example, such idleness might not pose a compelling hardship. Moreover, this interpretation seemed to promise an immediate way out for artists under contracts that had already exceeded seven years.⁸ ‘The effect of the Newton-John decision upon the recording industry’, Robert Steinberg noted already in 1981, ‘has been tremendous’ (1981: 104). It demonstrated to the industry that a contract with a fixed duration weakens the employer’s bargaining

8 See Melissa Manchester v. Arista Records (1981).

position, and spurred executives, attorneys and lobbyists to create a way around this newly discovered hazard.⁹

In response, the RIAA set out to eliminate ‘seven year rule’ protection for recording artists. In 1985, acting explicitly on the association’s behalf, California state senator Ralph Dills (D-Montebello) introduced a bill to achieve that end. The bill foundered in various forms until, two years on, Dills finally introduced a version that appeared less coercive than earlier versions. Rather than extending the duration limit for all California workers for an additional number of years, this version specified that a person hired to produce ‘phonorecords’ could still leave the employment at the old seven year mark, but only if she had produced all the albums that could contractually have been required under the contract. If the departing artist had not fulfilled all possible album options set out in the contract she would be vulnerable for damages on ‘lost profits’ on those uncompleted albums. Thus, while the power of injunction expired at the seventh anniversary, the new law created a right for the company to demand damages of sufficient magnitude to keep the artist under contract. This version passed in 1987.

The arguments over the various versions of the bill are fascinating and I treat them in detail elsewhere (Stahl, 2010, forthcoming). Here, I want only to highlight some of the main themes in the RIAA’s 1985 arguments for the change. ‘[C]urrent law in California’, the association claimed, ‘has been used as a weapon by prominent, highly successful recording artists.’ By invoking the seven year rule, recording artists could ‘force their record company employer/financiers into renegotiating contracts under circumstances in which the record company is not even sure it will get the benefit of the new bargain.’ If the record companies did not submit, they argued, ‘the alternative to renegotiation is that the artist will sit out the balance of his contract term with impunity.’ The RIAA argued that the artist’s bargaining power, moreover, is unfairly enhanced ‘because he can and does earn substantial sums from ‘live’ entertainment tours and personal concert appearances’, reducing the artist’s dependence on the recording agreement for income. These ‘inequities’, they argued, would be corrected by Dills’ bill (Gang et al., 1985: 4). The bill passed, the ‘Olivia Newton-John problem’ (Passman, 2006: 101) was solved, and through their vulnerability to damages for records that could contractually be required (whether or not the options are ever exercised by the company), recording artists may be kept under contract for indefinite periods.

1992-3: Minimum compensation and negative injunctions

The seven year rule provides the employer with the remedy of an injunction against the employee within the seven year limit. The 1987 damages provisions, opponents to the carve-out argued, effectively extend the injunctive power beyond that limit.¹⁰ However,

9 Following the 1979 Newton-John case were those Donna Summer (1980), Melissa Manchester (1981), Sammy Hagar (1981), and Tom Scholz of Boston (1984) all sought relief with varying degrees of success. See McLane and Wong (1999).

10 Artist attorney Jay Cooper argued before a March, 19, 2002 hearing of the California State Senate Committee on the Judiciary that artist lawsuits ‘cost millions of dollars today, and very few artists in this world can afford those things, and they have to settle, they eventually have to cave, because...the

in order to be able successfully to petition a California court for an injunction against a non-performing employee, the employer must pass a simple test. The employer must have guaranteed and paid compensation at or above a minimum dollar amount set by a 1919 law. If they have not done this, they cannot obtain an injunction, no matter the behavior of the artist. In 1992, recording artist advocates sought to update that figure to an amount reflecting seven decades' worth of inflation. Their efforts, though partially successful, actually ended up weakening a central aspect of the law's public policy.

Injunctions against employees were prohibited in California until 1919, when the Legislature sought to grant employers more power to induce employee performance and found a precedent in the 19th century case of a concert promoter stymied by a recalcitrant singing star (*Lumley v. Wagner*, 1852). However, in recognition of the extreme nature of injunction's power of compulsion, the Legislature set a strict condition on their issuance: the worker had to have been guaranteed and paid no less than \$6000 per year under the contract (California Civil Code, Section 3423). At the time, that sum – about five times the average annual wage for a working American – was thought to demonstrate both the extraordinary value of the performer to the employer and the good faith of the employer, thereby establishing the case for the injunction. The value of this sum has evaporated through inflation; the law has since been interpreted as an assignment of a 'counterweight' to the employer's ability to (otherwise costlessly) restrain a performer from performing for any other employer (Lucas, 1985: 1073). In the 1960s, 70s and 80s, a handful of cases (including *MCA v. Newton-John*) interpreted the law. In cases involving the comedian Redd Foxx (1966) and the singer Teena Marie (1984), the performers were released from their contracts because their record companies had neither guaranteed nor paid the statutory (and paltry) minimum of \$6000.

In 1992 California State Senator Henry Mello put forward a bill that would update the minimum compensation law in line with 70 years of inflation. Mello's bill replaced the \$6000 figure with \$50,000¹¹ and passed in both houses without a single 'no' vote. Almost immediately an alarmed RIAA contacted the legislature, arguing that the new minimum would have a 'severe', potentially 'destructive' effect on the industry (Lopez, 1993). Mello then convened a working group that came up with new legislation that was passed in 1993. The new legislation raised the 1919 figure to \$9000 in the first year of the contract, \$12,000 in the second, progressing to \$45,000 in the seventh year. The reduction in the revised 1993 bill of 1992's \$50,000 minimum – particularly pronounced in the first years of a contract – was very well received by smaller firms. 'This is the greatest thing for a small record company', an independent music executive told *Billboard*, 'because it protects us against being outbid', as can happen once a small record company's artists become successful and attractive to bigger firms (Fitzpatrick, 1993: 23).

threat of a lawsuit is almost the same as an injunction' (audio recording on file at the California State Archive, Sacramento).

- 11 While five times the average annual wage of a working American in 1992 was \$100,000, the rationale of the BHBA was that 1919's \$6000 were worth \$47,000 in 1992, and that \$50,000 would sufficiently increase the 'counterweight' against the power to enjoin an employee to restore the teeth to the 1919 law.

However, the new law contravened a public policy rationale expressed by the courts in the earlier cases. The law's original rationale is protective, it denies employers access to an injunction unless the employee has been well paid up to the moment of disagreement. In the 1960s record companies began inserting a new kind of option clause in their contracts which gave them the option to make (or make up) the minimum payment in response to an artist's announcement of his or her intention to stop performing under the contract. The Teena Marie court's opinion oozes with disdain for this practice and finds that it violates the law. If this new form of option is found to be legal, that court wrote,

the company may wait until the last possible moment to exercise its option. Motown and Jobete filed suit against Teena Marie in August 1982 but waited until September 1982 to exercise the option clauses. The request for a preliminary injunction was filed two months later. Thus, the companies purchased an insurance policy worth a considerable sum [Motown's profits on Teena Marie's recordings were quite high] for a minimal premium just prior to the time they could be fairly certain a loss would occur. If the option clause [could be found to] meet[] the statutory requirement of minimum compensation, [then] the company can buy its insurance policy on the courthouse steps on its way to seek an injunction. (*Motown Record Corporation v. Tina Marie Brockert*, 1984)

'Indeed', the court continued, 'the company may be able to buy its insurance policy after the "accident" has occurred; that is, after the artist has already signed and recorded with another company' (*Motown Record Corporation v. Tina Marie Brockert*, 1984). The 1993 law, however, allows precisely this 'courthouse steps' insurance policy. As *Billboard* reported,

the new bill allows a company to retain an artist even if the company does not meet the minimum compensation rate – as long as it agrees to pay 10 times the difference of the original compensation. For example, if an artist is paid only \$ 7,000 on a one-year contract, which is \$ 2,000 below the minimum, the company may keep the artist by paying \$ 20,000. (Fitzpatrick, 1993: 23)

The company, in other words, may buy the right to enjoin the artist, if the artist attracts attention from another company, even if they've paid the artist nothing up until that time. The very strategy scorned and invalidated by the Teena Marie court as contravening the law's founding logic became fundamental to the operation of the law, which underwrites the (albeit more expensive) 'courthouse steps' insurance policy. Guaranteed and paid minimum compensation is no a longer necessary precondition for an injunction, as long as the original company is willing to cough up a larger amount of money to obtain the injunction and thereby prevent the artist from accepting other bids.

1998: Bankruptcy and the rejection of contracts

In the mid- to late 1990s, a handful of recording artists – notably including African-American performers Run-DMC (1993), TLC (1995), and Toni Braxton (1998) – sought bankruptcy protection. The latter's filing was particularly big news because at the time her hit song 'Unbreak My Heart' 'was still generating countless radio royalties' (De Lisle, 2000: 72). One feature of a successful bankruptcy petition is the release of the petitioner from obligations known as 'executory contracts', that is, contracts that require the performance ('execution') of some specified action in the future. Debt is one such contract but there are many others, including the recording contract (Brewer, 2003:

588). Shortly after Braxton's bankruptcy filing, the RIAA attempted to change pending federal legislation (then being pushed by credit card companies) in order to make it more difficult for recording artists to declare bankruptcy and void their recording contracts. This effort was rebuffed, and the 1998 legislation failed. However, the recording industry's position – along with those of the consumer credit industries – was strengthened when sweeping bankruptcy reform legislation was passed several years later.

The important place of bankruptcy provisions in US law was first recognised in Article 1, Section 8 of the U.S. Constitution; despite this recognition, it was not until 1898 that bankruptcy law became a permanent feature of US law (Landry and Mardis, 2006: 94). The first major reform of the law took place in 1978, which, according to Robert Landry and Nancy Mardis 'did not alter the fundamental policy [that had long been] in favor of debtors' (2006: 94). For most of its history US bankruptcy law placed a significant burden on creditors to demonstrate that individuals seeking bankruptcy protection were doing so 'for reasons other than financial distress' (Pritchard, 1998: 8). The same burden to show 'bad faith' and/or 'substantive abuse' applied to record companies trying to enforce their contracts by contesting artist bankruptcy claims. Only a very small percentage of recording artists turn to bankruptcy; trying to escape a contract through the declaration of bankruptcy 'is risky', write MacLane and Wong, 'because there is no guarantee that the bankruptcy court will reject the contract in question' (1999: 27). In the wake of the successful bankruptcy gambles of Braxton, TLC, and Run-DMC, the credit card companies' legislative push offered the RIAA an opportunity to put obstacles in the way of artist bankruptcy.

In May of 1998, just a few months after Braxton's January bankruptcy filing, the RIAA pushed Representative Bill McCollum, a Republican from Florida's entertainment industry-dominated city of Orlando, to insert a provision into the pending bankruptcy reform legislation that would demand a higher standard of court scrutiny for recording artist filings than for those of any other kind of person.¹² A favorable Chapter 7 bankruptcy judgment empowers a court-appointed trustee to 'reject' executory contracts if it appears that doing so will facilitate a person's economic rehabilitation (Brewer, 2003: 589). In asking McCollum and other representatives to support the provision, the RIAA argued that artists were increasingly using the bankruptcy code's Chapter 7 language to escape from their recording contracts. 'Unscrupulous lawyers', acting on behalf of recording artists, argued RIAA president and CEO Hilary Rosen, 'are extorting record labels into rewriting existing record contracts – ones they freely entered for their clients – by threatening bankruptcy' (Stern, 1998: 6).

The RIAA advanced legislation that would alter the 'playing field' in their favour. They induced McCollum to insert their proposed language into the pending bankruptcy reform legislation after the bill had been discussed, 'without benefit of debate at the subcommittee and committee level' (Holland, 1998). Union officials discovered the new

12 Justin Pritchard noted that '[s]ince 1995, McCollum has received \$3,000 from the RIAA political action committee, campaign records show. House Judiciary Committee members overall received \$8,700 from the RIAA's PAC during the 1997-98 election cycle, including \$1,000 contributed to McCollum' (1998: 8).

language prior to its coming up for a vote. When made public, the legislation led to an outcry from artists and their professional and legislative allies. The RIAA (and, in this case, the sponsoring lawmaker) then contended the legislation was technical rather than substantive. The association insisted ‘that the legislation is not seeking a “special interest” exemption as its opponents are claiming, but instead is trying to close a loophole in current law’ (Seelye, 1998: A18). The RIAA provided no evidence that any of the recent bankruptcies had been pursued in bad faith, and little that any more than the handful of cases mentioned above had actually been threatened or taken place. In declining to document the scope of the problem, an RIAA lobbyist said ‘I simply can tell you based on personal conversations that there’s a problem that should be addressed’ (Pritchard, 1998: 8). McCollum acknowledged ‘I don’t recall the number precisely, but it strikes me that there’s three or four cases they cited to me’ (Pritchard, 1998: 8). Thus, while observers acknowledged the likelihood that recording artists’ bankruptcies were driven by artists’ desires for substantive re-negotiations, they also looked sceptically on the RIAA’s unwillingness or inability to substantiate its own claims.

Finally, concerned senators sent the RIAA to recording artist representatives to hammer out a compromise and ‘craft substitute language that does not specifically mention recording artists’ (Holland, 1998: 12). The two groups agreed on language suggesting somewhat toothlessly that bankruptcy judges may consider ‘whether an individual debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor’ (Holland, 1998: 12).

The bankruptcy reform legislation that ultimately passed (the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) made it more difficult for most Americans to pursue bankruptcy protection, though it contained no language pertaining solely to recording artists. By introducing means-testing and by shifting more of the burden of proof away from creditors and onto individuals seeking bankruptcy protection, the new legislation made it much more difficult for bankruptcy courts to excuse individuals from their financial obligations (Landry and Mardis, 2006).

Atavism at the threshold of digitalization?

Primitive accumulation and protective legislation

California’s seven year rule and its requirement of minimum compensation as a precondition of injunction, and federal bankruptcy law’s low pre-2005 threshold for voiding executory contracts, established and enforced limits on record companies’ power over recording artists’ labour. In order for record companies to maintain and advance their stability and profitability during turbulent times, the RIAA argued, recording artists had to be constrained in their capacity to invoke these legal limitations of employer power. I have suggested that the efforts of this group of employers to extend their control over their artists bears an obverse, corollary dimension: the ratcheting up of employer control requires and produces increased employee vulnerability. This is the salience of the primitive accumulation analysis: when capital encounters an obstacle or a limit it often works aggressively to overcome it; the limit’s

transcendence often requires and results in the erosion of the employee's political position.

The record industry's continued dependence on the long-term option contract might seem to contradict the 21st century's prevailing logics of digitalization and employment casualisation. In digitalization's brave new world of 'convergent media' and 'liquid life' (Deuze, 2007) contractual labour subordination seems as obsolete as the mortal coils of magnetic tape and vinyl grooves recently shuffled off by the record industry. It is tempting to understand record companies' legal paroxysms over capture and control, after Ernst Bloch and Frederic Jameson, as an ironic example of the 'simultaneity of the non-simultaneous', the 'the coexistence of realities from radically different moments of history[, of] peasant fields with the Krupp factories or the Ford plant in the distance' (Jameson, 1991: 307 (drawing on Ernst Bloch)). Yet the rigid enforcement powers on which companies still depend for their control of labour are not only not inimical to corporate flexibility, they are central to it. 'Casual' is an attribute of the job and not the worker. As Guy Standing writes, prison labour is 'the most casual form of all, in that the worker has no rights, cannot bargain, and can be made to do as much labour as somebody sees fit' (2010: 71). The option contract is a one-way arrangement of obligation: employees are locked in, employers are free to exit at any time.¹³ Employer efforts at extending the capacity to capture, elicit, and control creative labour through primitive accumulation are consistent with casualisation in that they push past prior public policy or traditional limits on marketisation, on capital's freedom and expansion. When successful, such efforts diminish impediments that might otherwise constrain employer fiat.

When the RIAA pushes state and federal legislators to tilt the record industry 'playing field' in their favour, they are engaging the state in a project of primitive accumulation through the latter's power to impose what Marx called '[d]irect extra-economic force' (De Angelis, 2004: 67). The argument here is not about contrasting abstract or idealised states of 'freedom' and 'unfreedom' but about showing, with Michael Perelman, how employers and politicians incrementally adjust the rights of working people in different ways, at different times, in response to different constellations of forces and priorities. The constraining of recording artists' liberty by the restriction of their access to a market for their labour (case A), and by making it more difficult for them to pursue bankruptcy relief (case C), began 'with the identification [by capital] of a concrete limit and the deployment of strategies for its transcendence' (De Angelis, 2004: 72). Such 'strategies also target any given balance of power among classes that constitutes...a resistance against the further process of capitalist accumulation' (De Angelis, 2004: 70). The legalisation of the 'courthouse steps' option to justify an injunction in the absence of actual minimum compensation (case B) was a response to the resistant assertion of a new limit, in the form of a required \$50,000 annual payment to artists to justify injunction.

13 This standard industry deal framework is discussed in exhaustive detail in a number of recording industry reference works, including Passman (2006). Passman, a respected entertainment industry attorney, writes 'DON'T BE FOOLED! OPTIONS ARE NEVER GOOD FOR YOU!! They only mean you'll get dropped if you're not worth the price, or you'll get too little if you're a smash. So repeat after me: "OPTIONS ARE NEVER GOOD FOR ME!!!"' (2006: 99, emphasis original).

The 360 deal and the extension of the scope of the contract

A ‘hole in the universe’ cannot simply be plugged. As the record industry scrambles to reproduce itself around file-sharing, how are these relations changing? Music industry players and observers have proposed numerous models and strategies following the disruption of the CD-sales-based business model. Among the main innovations along these lines is the 360 deal. ‘360’ describes a situation in which the artist is contractually surrounded by corporate toll gates through which pass most or all artist revenues – not just record royalties – now subject to record company ‘participation’. In fact, in many such agreements, companies not only gain significant percentages of formerly inaccessible streams of revenue, but also decision-making power over those activities.¹⁴ ‘By expanding the scope of their relationships with artists’, notes Sara Karubian, ‘labels are shifting their focus from trying to reverse the trend of declining CD sales to compensating for the decreased sales by participating in more profitable arenas’ (2009: 422). This language of an expanded scope immediately suggests the identification by record industry capital ‘of a concrete limit and the deployment of strategies for its transcendence’ (De Angelis, 2004: 72). However, with the 360 deal, it is strategies of class power more than state power that are involved, reshaping the content rather than the legal conditions of the long-term talent option contract. The main target of this force is the longstanding barrier between artists’ record royalty income (customarily claimed by the record company) and artists’ traditionally independence-sustaining revenues from live performance, licensing of music (including to television and film producers, video game companies, advertisers), and merchandise (from tour t-shirts to deals with retailers like Hot Topic).

There are numerous practical advantages to both record companies and artists to engaging on these terms: not only are record companies – increasingly recreating themselves as what Edgar Bronfman Jr. calls ‘music based content companies’ (quoted in Schultz, 2009: 700) or what James McQuivey calls ‘music talent managers’ (quoted in Basch, 2008: E1) – invested in music marketing in a range of new and profitable venues, able to replace revenue lost to declining sales and reposition themselves better to take advantage of unforeseen licensing or marketing opportunities. New recording artists themselves may enjoy lowered pressure to produce hits and thus more time to develop their act and fan base, as well as a larger relative royalty percentage (Leeds, 2007); established artists can trade some relatively calculable profit for ‘a measure of financial certainty’ (Pearlstein, 2008: D1) as they shift some risk onto a big company like concert promoter Live Nation.

Observers disagree regarding the degree to which 360 deals might be becoming the new normal.¹⁵ In any case, according to Karubian, it appears clear that ‘the bargaining power dynamic remains relatively consistent in the shift from traditional to 360 deals’ (2009:

14 As is the case with Nickelback’s deal with Live Nation (Gallo, 2008: 1).

15 Some observers suggest the form is ‘used by all the major record labels’ (Leeds, 2007), that ‘it’s everywhere’ (producer Josh Abraham, quoted in Leeds, 2007). One record company president said that he didn’t ‘think there’s a deal being made today where the 360 model doesn’t come up’ (Morrissey, 2007). Others suggest that ‘those types of contract are still far from the norm’ (Sisario, 2009: C1).

442). In fact, her analysis indicates incremental gains in employer leverage as ‘labels have used their publicised crisis to their advantage in negotiating terms with artists’, appearing ‘justified in their claims that they need to dip into non-recording revenues when they insist that their full reliance on the recorded music business will lead them to extinction’ (2009: 443). Against this, Karubian notes that ‘many artists and their advocates worry that companies are invading and planting their flags in territories traditionally belonging to artists’ (2009: 443). Again, Karubian’s language points to the usefulness of a primitive accumulation analysis for understanding struggles over the boundaries to maximal marketisation of terrains of employment set by labour and finance law.

Michael Perelman’s account of the ‘secret history of primitive accumulation’ illuminates the strategic regulation by early liberal political economists and policymakers of ‘self provisioning’, the capacity of people to meet their own subsistence needs outside of, or without dependence on, the employment relationship (Perelman, 2000). Alongside the enclosures of common lands, 18th and 19th century policy makers and their political economist allies learned carefully to manage a mix of self-provisioning and wage labour in order to minimise the cost of labour. ‘They wanted’, Perelman writes, ‘to make sure that workers would be able to be self-sufficient enough to raise the rate of surplus value’ – self-provisioning as a wage subsidy – ‘without making them so independent that they would or could resist wage labor’ (2000: 107).¹⁶ The continuous form of primitive accumulation through the regulation of self-provisioning was ‘a matter of degree. ... capital would manipulate the extent to which workers relied on self-provisioning’, and hence the degree to which they depended on employers, ‘in order to maximize its advantage’ (2000: 32).

As Toynbee (quoted above) argues, popular music performers’ ability to sell their services to a number of buyers enabled them to avoid dependence on any single one.¹⁷ Although the recording contract is an employment contract, and state law treats recording artists as employees, their relative independence along these lines renders them more like independent contractors, market participants with little or no capital who ‘are able to protect themselves, to some extent, from work-related risks...because they self-insure themselves, to some extent, by spreading their risks’ among a number of clients (Davidov, 2002: 394). Michael Perelman argues that ‘the struggle against self-provisioning is not confined to the distant past. It continues to this day’ (2000: 11). I’m suggesting that popular music performers’ incomes from live appearances, licensing and merchandising functioned as a form of self-provisioning (within the market, yes, but not subject to record company claims), relieving recording artists from total dependence on record companies. This is precisely what the RIAA was

16 An exemplary target for this kind of policy was the English kitchen garden, the size of which was carefully regulated in the early 19th century. Perelman quotes Robert Gourlay, who in 1822 declared that ‘[i]t is not the intention to make labourers professional gardeners or farmers! It is intended to confine them to bare convenience’ (2000: 108).

17 At the same time, of course, artists’ non-recording income subsidizes record companies. See producer Steve Albini’s grim (1997) calculations.

complaining about in its 1985 arguments for the (1987) legislative carve out of recording artists from protection by California's seven year rule (quoted above).¹⁸

This principle is at the heart of recent legal analyses of the 360 deal. According to Ian Brereton, in addition to their income participation,

[t]he major labels' retention of final-decision making rights on all recording, touring, merchandising, and publishing activities forces artists, and ultimately their creative endeavors, to be subject to the complete control of their record label.

Casting this new relationship as a partnership, he writes, would be false; 'under this new type of agreement, the complete sacrifice of control to one party violates an important principle of partnership law', which requires mutual rights of control (2009: 195-196). Before the advent of the 360 deal, argues Tracy Gardner, an artist attempting to avoid involuntary servitude ('in which the victim is forced to work...by use or threat of coercion through law or legal process') by breaching her contract would be faced only with the loss of recording revenues. Under the new deal, where companies participate administratively and economically in non-recording activities like touring, licensing, merchandising, and so on, the artist 'is faced with a lack of alternate revenue streams upon which artists before her could rely' (Gardner, 2006: 755). 360 deals 'only add to the unconscionability of the artists' situation because artists have lost control over the ability to convert their musical fame into other financial opportunities' (Gardner, 2006: 750). The 360 deal represents capital's identification as a limit of what before had been simply a conventional separation between spheres of economic activity under its control and those under the control of the artist.

Despite radical challenges to the industry's business model, the major labels offer opportunities for which (aspiring) recording artists compete vigorously; pressure on aspirants to sign anything in order to enter what Steve Greenfield and Guy Osborn call the record deal's 'holy of holies' (1998: 177) means that if the 360 deal is what's on offer, few without significant bargaining power or attractive alternatives will be able to resist it. Abandoned by increasing numbers of file-sharing (non-) consumers, record company capital pushes in another direction, transcending former barriers, colonizing new regions of musical economic activity, and consolidating new dimensions of political control, particularly over legions of new artists in weak bargaining positions.

Conclusion

Throughout the 80s and 90s the RIAA engaged in a series of public, political contests with recording artists over several of the elements of state and federal legislation that set the terms of their contractual engagement. The two sides experienced differing degrees of success and failure in these contests, but the largely or apparently stable nature of the 'playing field' itself assured the incremental nature of most of the resulting changes. In the early 2000s, in the face of digitalization and file-sharing's apparently tectonic destabilisation of the record industry, the emerging '360 degree deal' promised

18 This argument was also made in MCA's complaint against Newton-John.

a way in which record companies and recording artists could continue to profit in the face of declining sales through the record companies' investment and participation in formerly off-limits forms of economic activity such as touring, licensing, and merchandising. 'Given their command of the entire recorded music industry', writes Tracy Gardner,

it is hardly surprising that the record labels are quickly gaining control over new revenue streams as well as traditional revenue channels that once belonged solely to the artist (2006: 751).

Yet, while this 'new deal' is still nascent, it appears to herald intensified relations of control and appropriation between record companies and recording artists.

This article has argued that both incremental changes in legislated authority relations and in private contractual conventions can be understood through the theoretical lens of primitive accumulation, a mode of political and class power exercised by capital to overcome limits to its expansion. Recording artists can be understood as an illuminating case of continuity and change in the social relations of cultural production under conditions of digitalization and the widespread unauthorised distribution of cultural commodities enabled by internet technologies. Seen from the primitive accumulation perspective, the persistence of binding, long-term option contracts is not anomalous in the context of digitizing, flexibilizing, 21st century terrains of employment. Rather, these new contracts are admirably suited to the maintenance of low-obligation cultural industry 'options' where the principal difference is found in the types of boundaries, limits, and obstacles encountered by record company capital in its pursuit of greater freedom favourably to arrange its artist employment relations. In this light, the impetus of cultural industry enterprise toward the intensification of long term capture and control of 'golden-egg' laying talent appears not to subside but to change form and venue.

When applied to the work of recording artists, categories like 'involuntary servitude' and 'primitive accumulation' sound strange. Their use in this context depends on a degree of abstraction that itself requires the putting aside of popular images and narratives of expressive individuals enjoying un-alienated lives and sometimes great fame and wealth. But it is precisely recording artists' extraordinary autonomy that constitutes certain aspects of their value, that makes their legal protections the targets of repeated employer attacks, and that makes their struggles so dramatic, so capable of bringing obscure logics into high relief. This examination of some of the legal dynamics of their unusually autonomous careers, of the laws that enable and constrain their capacity to say 'no' to the various historically-conditioned demands of their employers, argues that problems of autonomy and control have been and remain central to the relationships of recording artists and their record companies. Laws and conventions that preserve and protect this capacity pose impediments to the ability of record companies to extend their advantage, provoking reactions that, until recently, often took place in public, before legislators, and that now appear increasingly to be taking place in private negotiations over new contractual territories.

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